

91-289

Supreme Court, U.S.
FILED

JUL 1 1991

NO.....

IN THE SUPREME COURT OF THE UNITED STATES OFFICE OF THE CLERK

October Term 1991

BURRELL INDUSTRIES, INC.,
Petitioner

v.

CONTRACTORS SUPPLY CORP.,
Respondent

CORRECTED PETITION FOR WRIT
OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTIONS PRESENTED

1. Whether a state court violates a party's rights under the due process clause of the Fourteenth Amendment to the Constitution of the United States by failing to conduct a hearing at a meaningful time to determine the scope and extent of jury bias where a juror discloses to the court that jury bias toward one of the parties prevents the jury from rendering a fair verdict.

2. Whether, under the circumstances of this case, the absence of appellate review as a matter of right under state law constitutes a violation of the Petitioner's rights under the due process clause of the Fourteenth Amendment to the United States Constitution.



PARTIES TO THE PROCEEDING

The parties to the proceedings below are the same as listed in the caption except that Petitioner has since changed its name from "Ohio River Sand & Gravel Co." to "Burrell Industries, Inc." In accordance with Rule 29.1, Petitioner states that there are no parent or subsidiary corporations of Burrell Industries, Inc.



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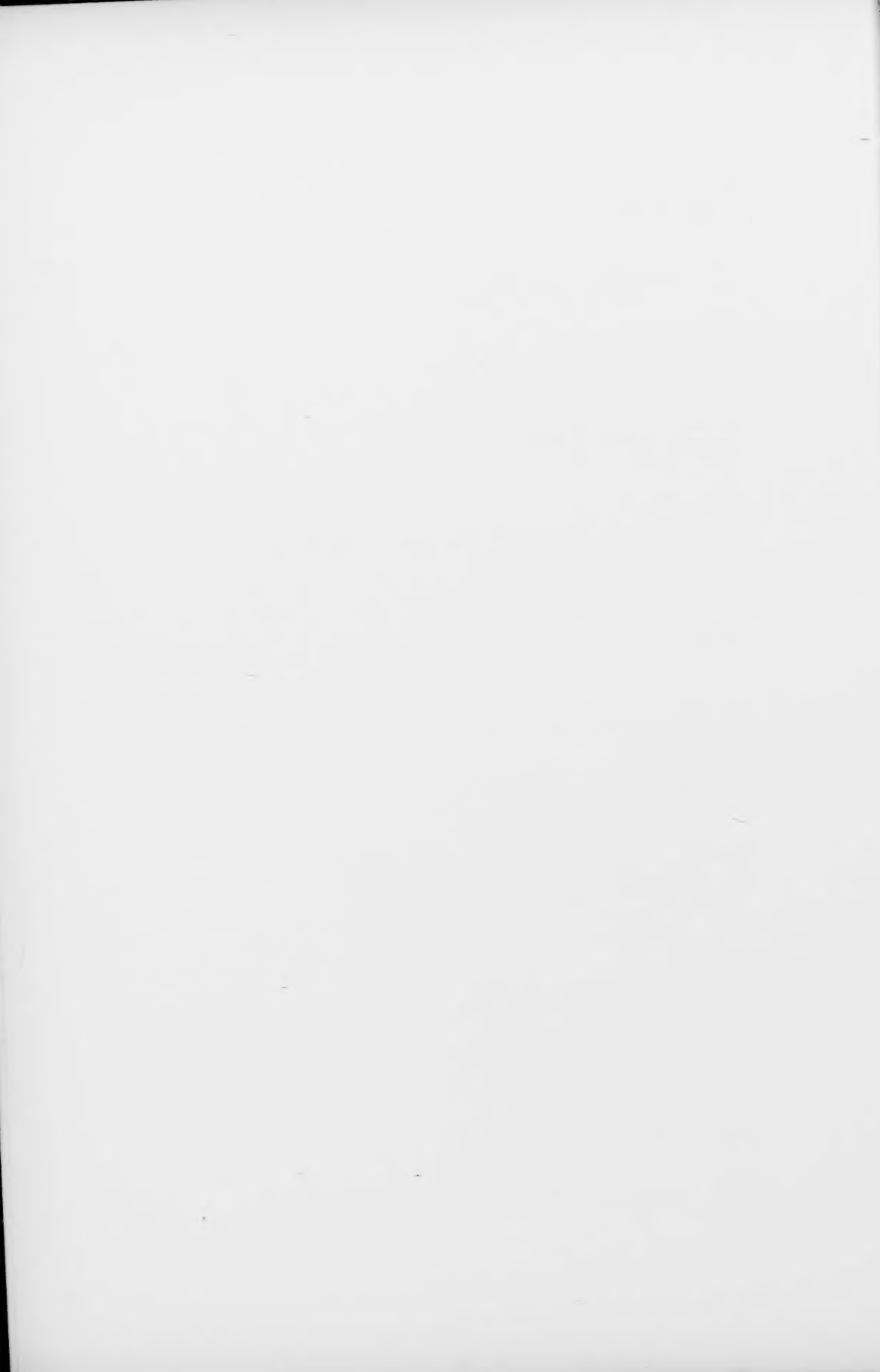
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STATES

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CORRECTED PETITION FOR WRIT
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OPINION BELOW

The opinion of the Supreme Court
of Appeals of West Virginia denying
Petitioner's appeal (see Appendix,
A-1) and the decision of the Circuit
Court of Ohio County, West Virginia
(see Appendix, A-14).



JURISDICTION

This Court has jurisdiction to review the questions presented by way of writ of certiorari under 28 U.S.C. §1257(a) in that the questions presented involve rights under the Constitution of the United States. The date of the judgment sought to be reviewed is April 2, 1991.

THE CONSTITUTIONAL PROVISIONS INVOLVED IN THIS CASE

The constitutional provision involved in this case is the Fourteenth Amendment to the Constitution of the United States which provides as follows:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State where they reside. No State shall make or enforce any law which shall abridge



the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

This matter began in the Circuit Court of Ohio County, West Virginia, wherein the Petitioner herein [plaintiff below] filed a suit against the Respondent [defendant below] for damages resulting from an alleged breach of a contract for the purchase and sale of aggregates, such as sand and gravel, used for making concrete.

Because there were two written contracts signed by the parties that contained different language concerning the price to be paid for



the aggregates, two trials were held at the trial court level. The first trial concerned only which of the two contracts was the operative contract. The second trial concerned the question of whether the defendant breached the contract found by the jury to be the operative contract, the issue of damages and the defendant's counterclaim alleging the plaintiff overcharged it. The same jury heard both cases and, in the second trial, the jury returned a verdict in favor of the defendant on its counterclaim against the plaintiff and assessed the defendant's damages at \$100,000.00 [pre- and post-judgment interest have increased the amount to approximately \$180,000.00].

At the second trial, after the jury retired to deliberate, the trial



judge disclosed to counsel that one of the jurors on the second day of the trial [which occurred in the prior week] disclosed to the Judge [in the Judge's chambers without the presence of counsel] that she did not think there could be a fair trial in the case because the jury had feelings about one of the parties that would prevent them from giving a fair verdict. The Judge then stated that she inquired whether the jury's feelings were generated because of its sitting through the prior trial and, upon being advised by the juror that they were, the Court advised the juror that the jury would be instructed that personal opinions not based upon the evidence could not be considered by them in reaching their verdict.



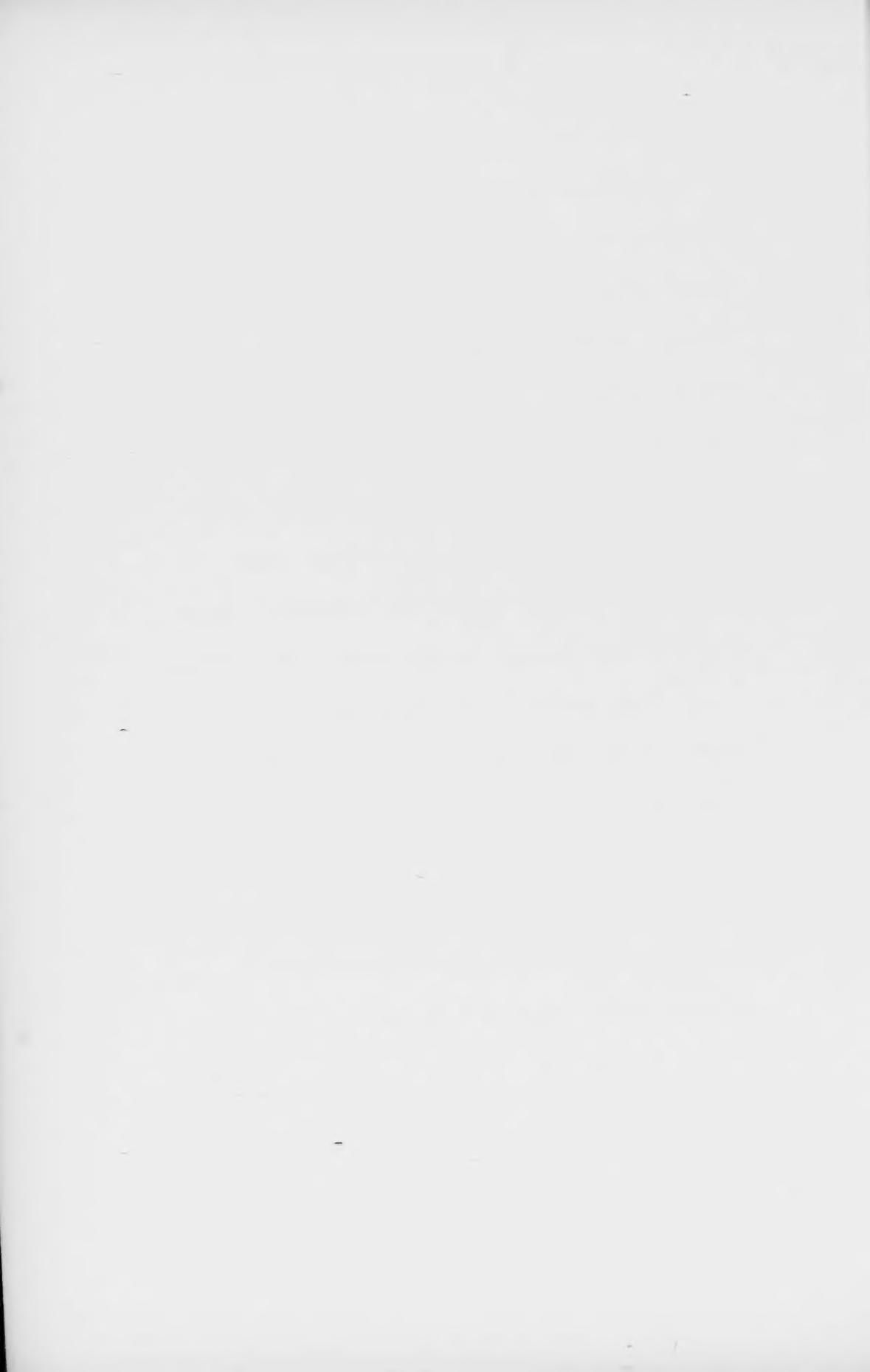
The Judge stated that the juror also referred to the juror's feelings about the case involving a small corporation verses a big corporation. Because of that latter remark, the Judge noted that she included, on her own initiative, an instruction advising the jury that it made no difference whether the case involved a small corporation against a big corporation.

After the disclosure, counsel for the plaintiff stated that he did not know if the disclosure required a response to which the Judge responded by stating "No, I think probably none of you know how to respond at this time. When the verdict comes in, I will probably have to meet again and discuss it."

1

Following the jury's adverse verdict on November 15, 1988, the Petitioner filed a Motion for a New Trial alleging, among other things, that it was deprived of the right to a fair trial because of the bias of the jury and requested a hearing in order to discover the scope, extent and duration of the jury prejudice. That Motion was filed on November 23, 1988.

Thereafter, on February 23, 1990, some 14 months after the jury verdict, the special judge appointed to hear that issue rendered a decision finding that the trial judge took sufficient steps to cure the problem. That action consisted of adding instructions which the Court knew, but which counsel did not know, addressed concerns of the jury and in polling the jurors to ensure that their



verdict was based solely on the evidence. In addition, the special judge indicated that the plaintiff failed to timely object to the trial judge's disclosure notwithstanding the fact that the trial judge specifically stated that no response was required at that time.

Thereafter, the plaintiff filed a Petition for Appeal with the Supreme Court of Appeals of West Virginia in which it was asserted that the plaintiff was denied a fair trial and that the trial court erred in not granting the plaintiff a hearing to determine the scope, extent and duration of the jury prejudice. By Order dated April 2, 1991, the Supreme Court of Appeals refused the Petition.

Because the Supreme Court of Appeals of West Virginia will not



consider a Petition for Rehearing in cases where the court refuses the appeal, Petitioner was unable to assert the second question presented concerning the absence of an automatic right of appeal as a violation of Petitioner's due process rights.

REASONS FOR GRANTING WRIT

1. The denial of the Petitioner's request for a hearing on the jury bias issue violates the Due Process Clause of the Fourteenth Amendment to the Constitution and is contrary to applicable decisions of this Court.

The Court has recognized that "a fair trial in a fair tribunal is a basic requirement of due process." Further, this Court has noted that "not only is a biased decision maker



constitutionally unacceptable, but 'our system of law has always endeavored to prevent even the probability of unfairness'" and that in some situations, "the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable."

Withrow v. Larkin, 421 U.S. 35 (1975);
In Re Murchison, 349 U.S. 133 (1955).

The Due Process Clause

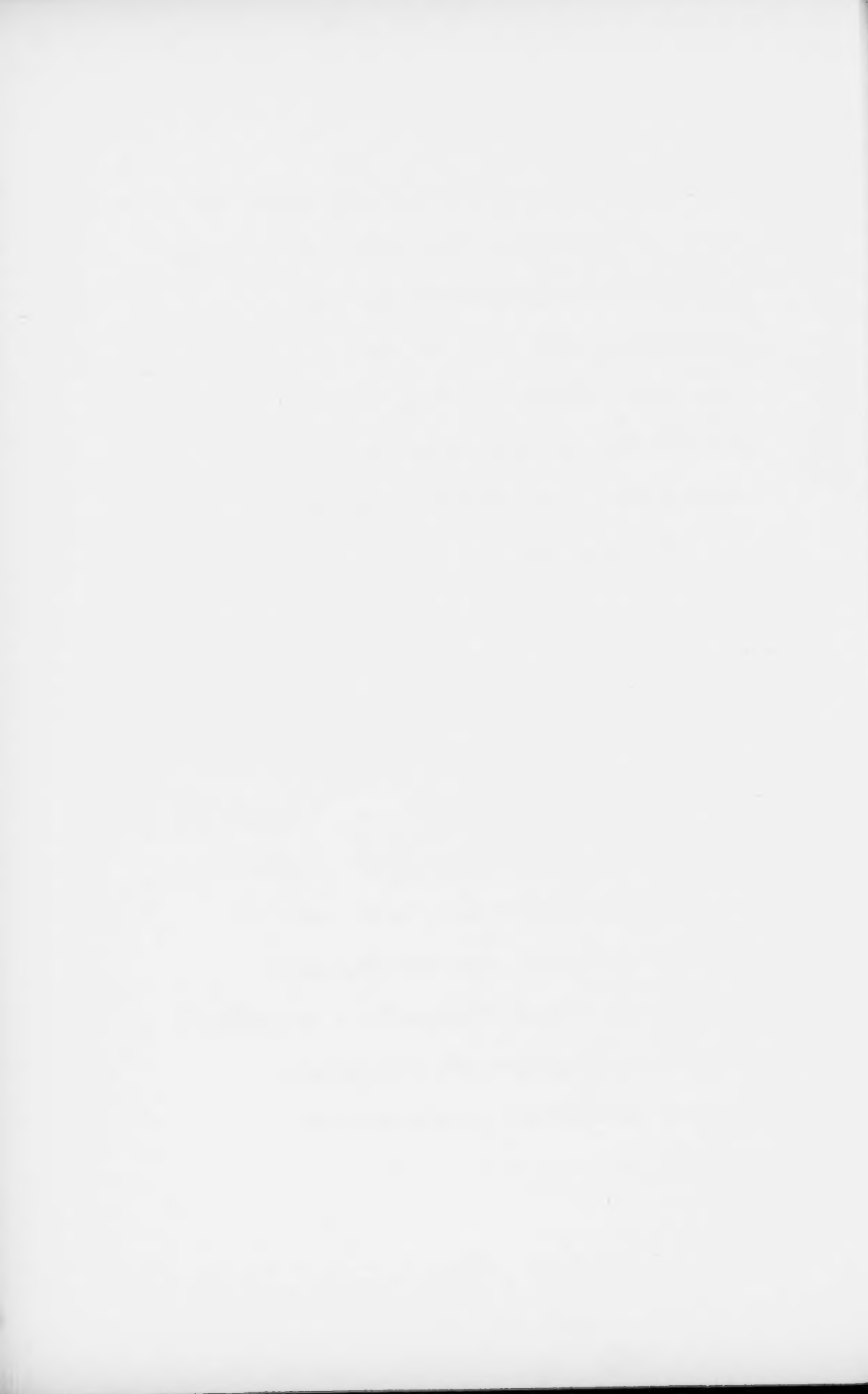
requirement of a fair trial before an impartial tribunal applies to civil as well as criminal cases. Marshall v. Jerrico, 446 U.S. 238 (1980). The neutrality requirement protects central procedural due process concerns and "helps to guarantee that life, liberty or property will not be taken in the basis of an erroneous or



distorted conception of the facts or law." "Justice," the Court said "must satisfy the appearance of justice." [Marshall, 446 U.S. at 242-43].

The "right to jury trial guarantees a fair trial by a panel of impartial 'indifferent' jurors" and the "failure to accord an accused a fair hearing violates even the minimal standards of due process. Both the trial court and the Court of Appeals have a duty to evaluate the jurors. Irwin v. Dodd, 336 U.S. 717 (1961).

It is thus clear that a fair trial is required under the Due Process Clause. The Due Process Clause also requires certain minimum procedural safeguards to protect against arbitrary state action.



Among the fundamental procedural due process requirements are the right to notice and an opportunity to be heard at a meaningful time and in a meaningful manner. Fuentes v. Shevin, 407 U.S. 67 (1972) "The constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decisionmaking when it acts to deprive a person of his possessions." [Fuentes, 407 U.S. at 80].

Just how much process is due and the type of process due depends upon the protections a particular situation demands. Morrissey v. Brewer, 408 U.S. 471 (1972). But, the right to a hearing before a "neutral and detached" forum is among the "minimum requirements of due process." [Morrissey, 92 S.Ct. at 2604]. See



also Wong Yang Sung v. McGrath, 339 U.S. 33 (1950).

This Court has recognized the due process right to a hearing in numerous situations. Goss v. Lopez, 419 U.S. 565 (1975) (temporary suspension of students in public school system); Morrissey v. Brewer, supra., (revocation of parole); Fuentes v. Shevin, supra., (prejudgment replevin statutes); Wong Yang Sung v. McGrath, supra., (deportation proceedings); Connell v. Higginbotham, 403 U.S. 207 (1971) (termination of state employee); Goldberg v. Kelly, 397 U.S. 254 (1970) (termination of welfare benefits); Bell v. Burson, 402 U.S. 535 (1971) (driver's license revocation). These due process requirements have all been duly noted and followed by the Supreme Court of



Appeals of West Virginia. See e.g.
North v. West Virginia Board of
Regents, __W.Va.__, 233 S.E.2d 411
(1977).

In this case, it is clear that a legitimate and substantial question of the jury's bias toward one of the parties was brought to the attention of the trial court and the Supreme Court of Appeals of West Virginia. It is also equally clear that the plaintiff requested a hearing to determine the scope and extent of the jury's prejudice. Neither the trial court nor the Supreme Court of Appeals granted the request for a hearing. Yet, in West Virginia Human Rights Commission v. TenPin Lounge, Inc., __W.Va.__, 211 S.E.2d 349 (1975), the Supreme Court of Appeals of West

Virginia, in Syllabus 2, stated as follows:

"Upon an allegation before a trial court that a juror falsely answered a material question on voir dire, and where a request is made for a hearing to determine the truth or falsity of such allegation it is reversible error for the trial court to refuse such hearing."

The failure of a state court, including a State Supreme Court, to follow established procedures under state law may result in a denial of due process where such failure "renders the state proceedings so fundamentally unfair or deficient that they are inconsistent with the rudimentary demands of fair procedure." Klimas v. Mabry, 599 F.2d 842, 847-48 (8th Cir. 1979).

The right to a fair trial before an impartial jury is among the most

important and fundamental rights existing in our legal system. The protection of that right through procedural due process is certainly as important as are the procedural due process rights against arbitrary governmental actions concerning students, parolees, possessors of driver's license and debtors, with respect to all of whom this Court has constitutionally guaranteed a hearing before detrimental governmental action is undertaken. If the Constitution guarantees a hearing to vindicate, protect and preserve those rights, no less can be required to vindicate, protect and preserve the most basic of rights--the right to a fair trial before an impartial jury. The failure of the state courts to grant the petitioner a hearing at a meaningful



time constitutes a violation of its due process rights. Petitioner respectfully requests that it be granted a hearing on the jury bias issue.¹

2. The absence of an automatic right of appeal in West Virginia violated the Petitioner's due process rights in that the Petitioner was deprived of a remedy for the violation of a substantial constitutional right.

West Virginia is among a small number of states that has neither an intermediate appellate court between the trial court and the State Supreme Court, nor the right of an automatic appeal. See Bilotti v. Dodrill, __W.Va.__, 394 S.E.2d 32 (1990). This Court has stated that the Constitution

does not establish a right to an appeal. See U.S. v. MacCollom, 426 U.S. 317 (1976); Griffin v. Illinois, 351 U.S. 12 (1956); McKane v. Durston, 153 U.S. 684 (1894). But, See Jones v. Barnes, 463 U.S. 745 (1983) (dissent of Justice Brennan).

The Petitioner contends, however, that as applied to the facts of this case, the failure of the Supreme Court to grant the Petitioner's appeal constitutes a violation of the Petitioner's rights under the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States. As indicated previously, the Due Process Clause requires a fair trial before an impartial jury. The failure of the



Supreme Court of Appeals of West Virginia to review a substantial constitutional defect is, itself, a violation of the Due Process Clause. In the circumstances of this case, the Court's denial of the appeal constitutes arbitrary and capricious action which is prohibited under the Due Process Clause.

The West Virginia Supreme Court of Appeals has recognized that the constitutional right to a trial includes the right to a fair trial before an impartial jury. As Justice Brennan stated in Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830 (1985), the "right to appeal would be unique among state actions if it could be withdrawn without consideration of applicable due process norms." He further noted that "when a state opts to act in



field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution--and in particular, in accord with the Due Process Clause." [469 U.S. at 400-401].

Where, as here, the Court has recognized or established the constitutional right to a fair trial before an impartial jury and where the court has clearly and expressly declared the right to a hearing concerning jury prejudice, the failure to grant the appeal or direct a hearing, constitutes an arbitrary and capricious denial of Petitioner's rights in violation of the Due Process Clause. As this Court stated in Irvin v. Dodd, supra., an appellate court has a duty to "independently evaluate"



the impartiality of the jury, [366 U.S. at 723], which did not occur in this case at either the trial court or appellate court stages of the case.

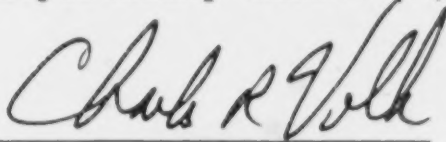
Where a State Supreme Court fails to provide a particular litigant the benefit of established state laws, such action may "result in a denial of due process when the error made by the state court renders the state proceedings so fundamentally unfair or so fundamentally deficient that they are inconsistent with the rudimentary demands of fair procedure." Klimas v. Mabry, 599 F.2d 842 (8th Cir. 1979).

CONCLUSION

The Petitioner respectfully contends that the combination of the refusal of the trial court to grant it a hearing on the jury bias issue

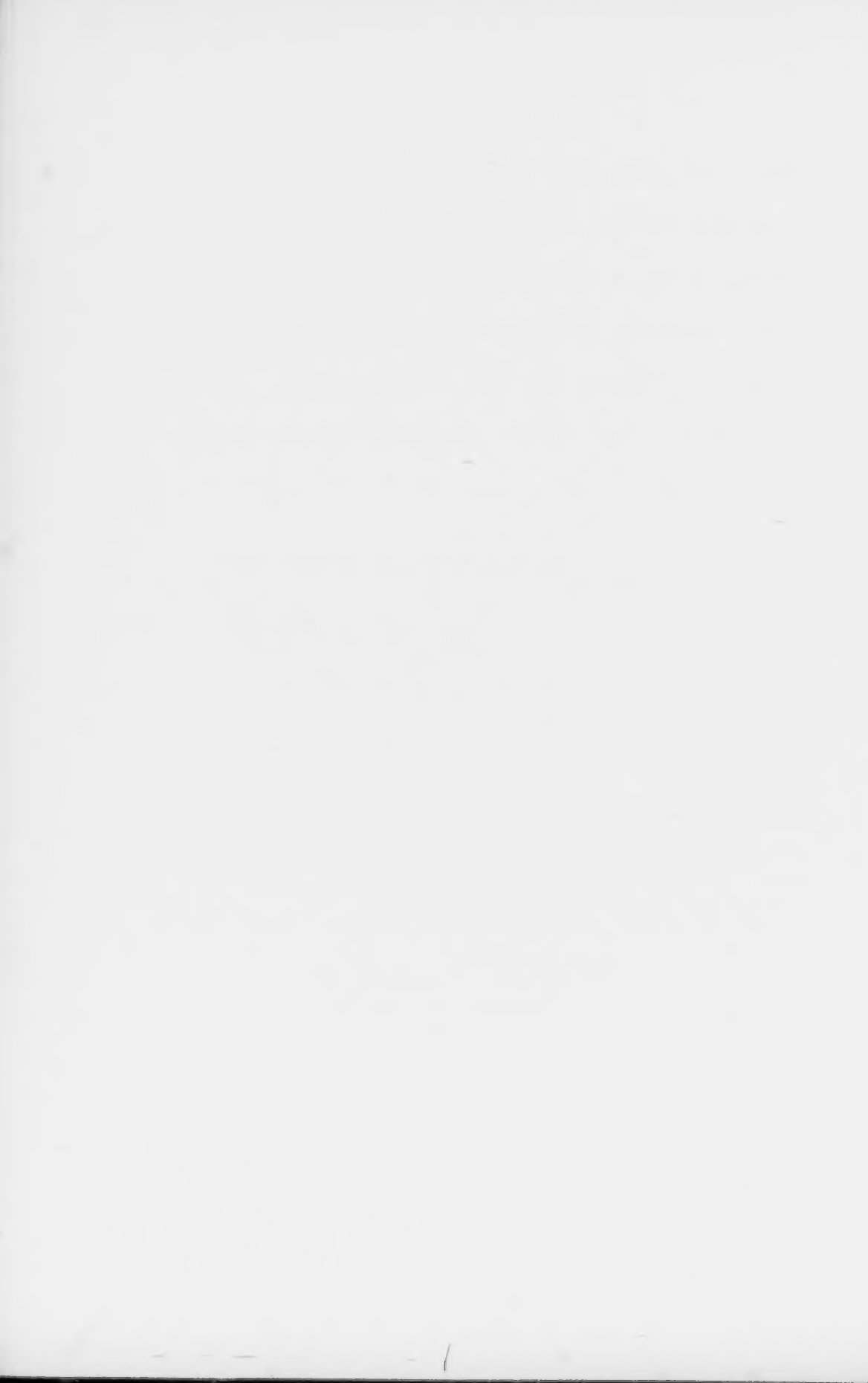
coupled with the refusal of the State Supreme Court to consider the appeal, results in a violation of the Petitioner's rights under the Due Process Clause of the Fourteenth Amendment for which the Petitioner has no remedy.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Charles R. Volk".

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APPENDIX



STATE OF WEST VIRGINIA

At a Regular Term of the
Supreme Court of Appeals continued and
held at Charleston, Kanawha County, on
the 2nd day of April, 1991, the
following order was made and entered:

Ohio River Sand and Gravel Company, a
West Virginia corporation, Plaintiff
Below, Petitioner

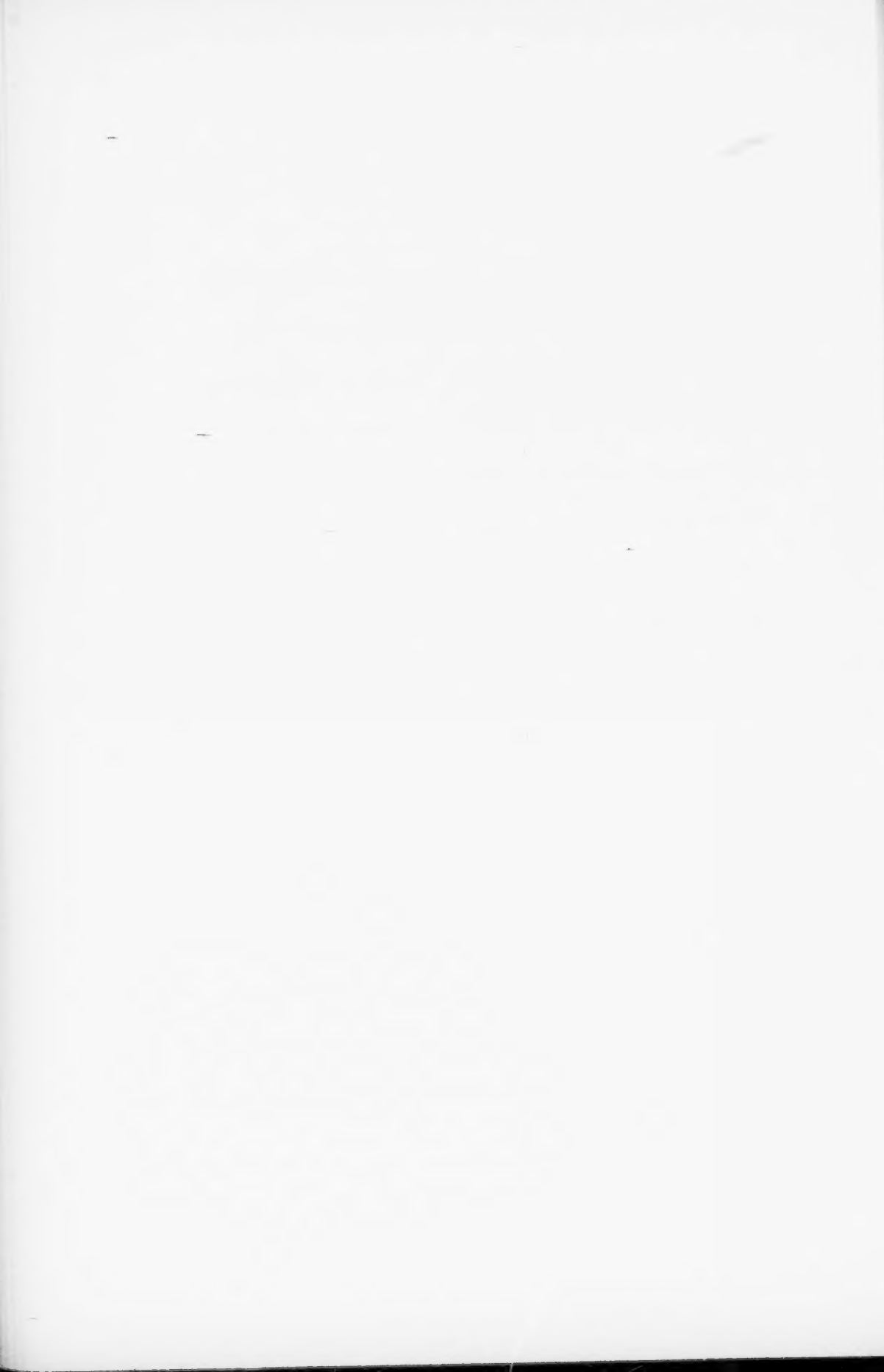
vs.) No. 910328

Contractors Supply Corporation, a West
Virginia corporation, Defendant Below,
Respondent

On a former day, to-wit,
February 28, 1991, came the
petitioner, the Ohio River Sand &
Gravel Company, a West Virginia
corporation, by Volk, Frankovitch,



Anetakis, Recht, Robertson & Hellerstedt, Arthur M. Recht, and Ronald B. Johnson, its attorneys, and presented to the Court its petition praying for an appeal from a judgment of the Circuit Court of Ohio County, rendered on the 25th day of May, 1990, with the record therein accompanying the petition. Thereafter, on the 12th day of March, 1991, came the respondent, Contractors Supply Corporation, a West Virginia corporation, by Schrader, Byrd, Byrum & Companion, James F. Companion, and Janet A. Sheehan, its attorneys, and presented to the Court its written response in opposition thereto. Upon consideration whereof, the Court if [sic] of opinion to and doth hereby



refuse said petition for appeal.

Justice Brotherton would grant.

A True Copy

Attest: /s/ Ancil G. Ramey
Clerk, Supreme Court
of Appeals



IN THE CIRCUIT COURT OF OHIO COUNTY,
WEST VIRGINIA

OHIO RIVER SAND & GRAVEL CO.,
Plaintiff, v. Contractors Supply
Corp., Defendant
Civil Action No. 86-C-271

Transcript of second trial November 9,
1988

COMMENTS MADE BY JUDGE TSAPIS AT THE
CONCLUSION OF THE CLOSING ARGUMENT,
AFTER THE JURY RETIRED TO THE JURY
ROOM TO BEGIN DELIBERATIONS:

JUDGE TSAPIS; On the second day
of the trial, the morning of the
second, one of the jurors approached
me, the lady that sits at the end, and
said she wanted to speak to me before
we began. I normally never discuss
anything with a juror, but thinking it
had to do with the scheduling since
some of the jurors were concerned
about their work schedule, I said,
"come in chambers".

She started out by making a

statement to me that she didn't think there could be a fair trial in the case and I said, "Why?" and she said - I don't know if she said we or they - had feelings about one of the parties that would possibly prevent them from giving a fair verdict. And I said, "Are those feelings feelings that were personal to the jurors before they were selected to serve on the jury originally, or feelings that were generated because of sitting through the prior trial in this case?" And she said it was, I said, "Based on the evidence you heard at the last case?" And she said, "Yes, it was based on the evidence in the previous case." And I said, "all the jurors will be instructed that personal opinions not based on the evidence can not be considered by them in reaching the

verdict at trial." And I decided to emphasize that in the final charge.

The main reason I didn't disclose that to all of you at the time was because I had hopes the matter would be settled without any further ado, and it didn't turn out that way. After we invested so much time in the trial I felt that rather than going ahead and doing anything and having to start the trial again, that I would wait and see what the outcome of this trial is going to be. I have been very concerned about it because I possibly should have immediately said something, but all those circumstances prevented me from doing that.

This juror also stated she wondered whether there would be feelings about this being a small corporation versus a big corporation



and I told her that they would be instructed in regard to that and that's the reason I threw into the final charge the point that it makes no difference if it's a small corporation versus a big corporation.

In all my seventeen years as a judge this is the first time I ever allowed something like this to happen and not disclose it immediately. I felt I had a justifiable reason.

I intend, when the jury reports their verdict, to have them polled and ask them at that point whether that person's verdict was based strickly on the evidence and after that it's going to be in the hands of the attorney in regard to what they want to do about the disclosure.

MR RECHT; I don't know if it requires a response.

THE COURT; No, I think probably none of you knows how to respond at this time. When the verdict comes in I probably will have to meet again and discuss it.

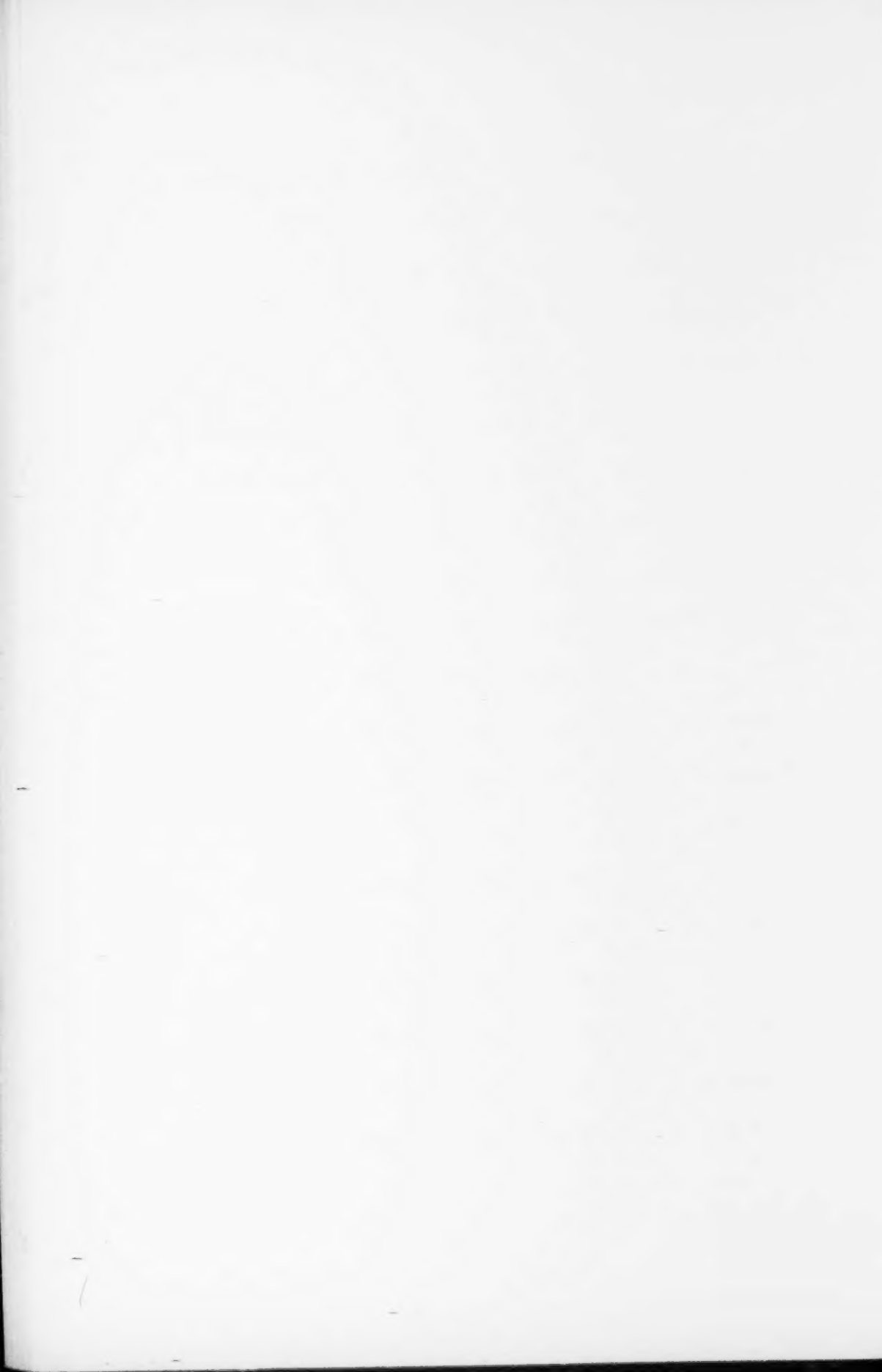
(Whereupon the jury notified the judge they had a question, which read as follows:)

THE COURT; "We would like to see the judge's notes from today."

I think the Supreme Court says you have to give it to them if they ask for it. Look at this and see what you think.

MR. STAMP; Isn't there a rule that prohibits giving it to them?

THE COURT; There's a recent Supreme Court decision about it. Recent developments in civil law. I think there's a recent decision that



says you have to give it to them if they ask for it.

MR. RECHT; I recall it, but I thought there were certain...

MR. STAMP; I'd like to see that case.

THE COURT; It would be a 1988 case.

MR. RECHT; Is it in the slip opinions?

THE COURT; Yes.

(COUNSEL proceeded to the Law Library to research the law.)

MR. RECHT; Insofar as Ohio River Sand & Gravel is concerned and Rule 51 would require Ohio River Sand & Gravel would be willing to consent to allowing the instructions to go to the jury.

MR. STAMP; Contractor's Supply does not consent.

THE COURT; Okay. I'm just going to write a little note. 'I can read the charge to you again. Judge C.T.'

(WHEREUPON the jury came back into the courtroom at 4:01 p.m. and the following took place:)

THE COURT; I'm sorry, but there are rules about doing this and I'm not quite certain where we stand, so I would just as soon read it again.

(Whereupon the judge read the charge in full to the jury and they returned to the jury room to continue their deliberations at 4:25 p.m.)

(Whereupon at 4:55 p.m. the following took place:)

THE COURT; At about five to five o'clock the jury sent a note to the judge asking the following question; "If we settle in favor of a party, can

we award damages in any amount (even \$1.00)?"

The court simply answered yes to that question and the note was returned to the jury room.

(Whereupon at 5:26 p.m. the jury informed the court they had reached a verdict and the jury panel came into the open courtroom;)

THE COURT; Have you reached a verdict?

FOREPERSON; Yes, Your Honor.

THE COURT; Would you give the form to the bailiff so that he can give it to the clerk.

THE CLERK; We, the Jury, find in favor of Contractor's Supply and assess damages in the amount of \$100,000.00. Charles Jerrome, Foreperson.



THE COURT; The court would like to poll the jury. Did you reach this verdict based only on the evidence you heard in this trial and the previous trial of this case?

JUROR; Yes I did.

THE COURT; Did you reach this verdict only on the evidence you heard in the previous case and this case?

JUROR; Yes Your Honor.

THE COURT; Did you reach the verdict based only on the evidence you heard in this trial and the previous trial of this case?

JUROR; Yes Your Honor.

THE COURT; Did you reach this verdict based only on the testimony you heard in this case and the previous case?

JUROR; Yes I did, Your Honor.

THE COURT; Did you reach this verdict based only on the evidence you heard in this case and the previous trial?

JUROR; Yes I did Your Honor.

THE COURT; Did you reach your verdict based only on the evidence in this case and the previous case?

JUROR; Yes.

THE COURT; Very well. Thank you very much for your service. This has been a very trying case. Contract cases are usually not as exciting as some of the others. Thank you very much.

MR. RECHT; We will simply reserve the right to file motions within the time period established by the Rules.

THE COURT: Very well. Thank you.



IN THE CIRCUIT COURT OF
MONONGALIA COUNTY, WEST VIRGINIA

OHIO RIVER SAND & GRAVEL
COMPANY,

Plaintiff,

vs

Civil Action
No. 86-C-271

CONTRACTORS SUPPLY
CORPORATION,

Defendant.

MEMORANDUM ORDER

This matter came before the
Circuit Court of Monongalia County,
Judge Larry V. Starcher presiding, on
paragraphs 6 and 9 of the Plaintiff's
Motion for New Trial.

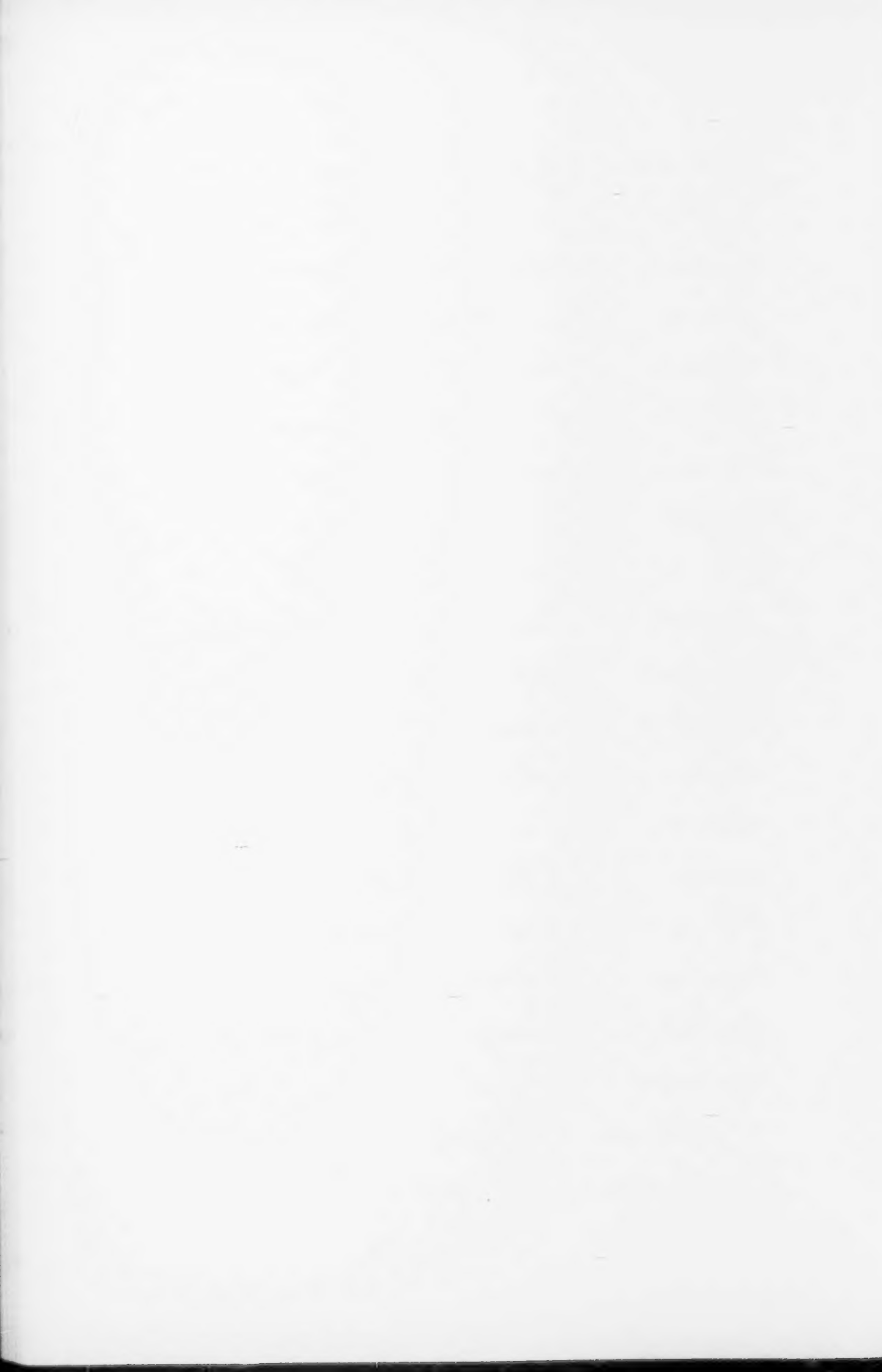
Facts

This matter was tried before a
jury with Judge Callie Tsapis of the
Circuit Court of Ohio County
presiding. This is a contract case
involving the sale of aggregates. The

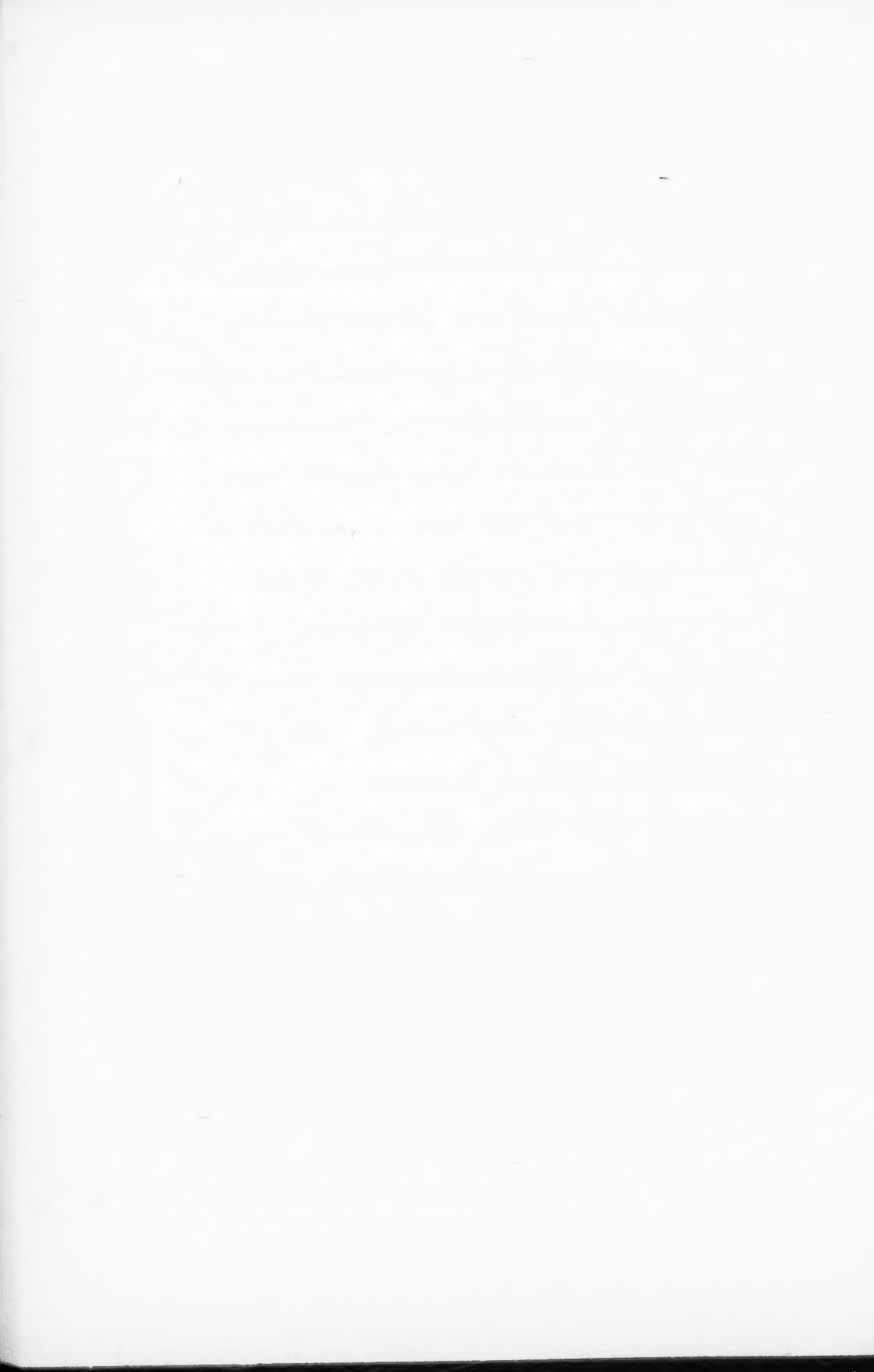
case was bifurcated. In July of 1988 a trial was held in which the jury was to determine which of two contracts was operative. The contracts were designated "Contract A" and "Contract B". The jury subsequently found that "Contract A" was the operative contract.

A second trial was held in November of 1988 before the same jury. The jury was then to determine whether either party breached "Contract A". If the jury found the contract had been breached, it was then to determine what damages had resulted. The jury found that the contract had been breached by the plaintiff and awarded the defendant \$100,000.00 on its counterclaim.

On the morning of the second day of the second trial one of the jurors



approached Judge Tsapis. The juror indicated to the judge that she or some other members of the jury had "feelings" about one of the parties that would possibly prevent them from reaching a fair verdict. The juror also indicated to Judge Tsapis that these feelings had been generated by evidence heard in the first trial. The juror also stated that she wondered whether there would be feelings about this being a big corporation versus a small corporation. Judge Tsapis did not immediately alert counsel for the parties about her conversation with the juror. The judge did, however, alert counsel while the jury was deliberating. Neither plaintiff nor defendant made any motions at that time. A verdict was then returned in



favor of the defendant for \$100,000.00. Judge Tsapis then polled the jury and asked them if their verdict was based solely on the evidence. Each of the jurors indicated that their verdict was for the defendant and based solely on the evidence. The plaintiff subsequently made its Motion for a New Trial.

Judge Tsapis requested the Supreme Court to recuse her and all First Circuit judges and that the part of the Motion for New Trial that raised the issue of her conversation with the juror be considered by a judge from another circuit. In its Administrative Order dated January 24, 1989 the Supreme Court granted this request and appointed Judge Larry V. Starcher of the 17th Judicial Circuit to decide this issue.

Discussion

Plaintiff has contended that the verdict in the second trial should be set aside based solely upon the judge's failure to disclose the juror's concern about prejudice toward one of the parties. The plaintiff argues that if the Court had disclosed the juror's concerns, the entire jury panel could have been voir dired and that the judge and/or counsel could have then acted accordingly. However, the jurors' responses when polled clearly showed that Judge Tsapis took sufficient steps to ensure that the jury was not influenced by bias or prejudice and that the verdict was based solely on the evidence. Judge Tsapis also took other precautions to preserve a fair trial. In the initial charge to the jury, the judge stated:

You must find your verdict unaided, unassisted, and uninfluenced by any personal information which you might have, and you must not permit yourselves to be guided, influenced, or swayed by sympathy or by your personal feeling regarding any of the parties.

In the final charge to the jury the judge stated:

You are further charged that any personal opinion which you may have as to the facts not established by the evidence presented in this case, cannot be considered by you as the basis of your verdict.

Moreover, Judge Tsapis amended Defendant's Instruction No. 7 and added the following:

I must also instruct you that your verdict should not be based on any personal feelings such as whether you like or dislike any witness or party, or as to whether



you are considering a small corporation versus a large corporation.

Judge Tsapis also stated in her comments made at the conclusion of closing arguments that "Personal opinions not based on the evidence cannot be considered by them in reaching the verdict at trial." She also stated "and I decided to emphasize that in the final charge."

Usually, determinations of whether a jury is biased or prejudiced is left to the discretion of the trial judge. State v. Gargiliana, 138 W.Va. 376, 379, 76 S.E.2d 265, 267 (1953) cited in West Virginia Dept. of Highways v. Fisher, __ W.Va. __, 289 S.E.2d 312 (1982). In the case at hand, Judge Tsapis took steps which she believed would preserve a fair trial.



Ordinarily, the verdict of the jury when based on the evidence, will not be disturbed if there is a rational basis for such verdict taking into consideration all of the evidence relating thereto. Virginia Land Immigration Bureau v. Perrow, 119 Va. 831, 89 S.E. 891 (1916), cited in Salerno v. Manchin, 158 W.Va. 220, 213 S.E.2d 805 (1974).

A trial court may, in its discretion, refuse to set aside a verdict and grant a new trial when the application is based only upon the desire of the parties to have another trial. Guyandot Valley R. Co. v. Buskirk, 57 W.Va. 417, 50 S.E. 521 (1905).

The trial court cannot properly set aside a verdict and grant a new trial when it has committed no error



to the prejudice of the party against whom the verdict was rendered and the verdict is not plainly contrary to the law and the evidence. Rosenthal v. Fox, 70 W.Va. 752, 74 S.E. 959 (1912). In the current case, the jury was fully, fairly and accurately instructed and plaintiff has demonstrated no reason to believe the verdict was not based solely on the evidence.

The plaintiffs failed to timely object to Judge Tsapis' disclosure, choosing instead to gamble on the outcome of the trial. Since a verdict for the defendants was returned, plaintiff cannot now claim they were deprived of a fair trial. A right is waived when the right exists, the party charged with the waiver knows of the right's existence, and there is a

voluntary intention to relinquish it.

Hoffman v. Wheeling Sav. & Loan

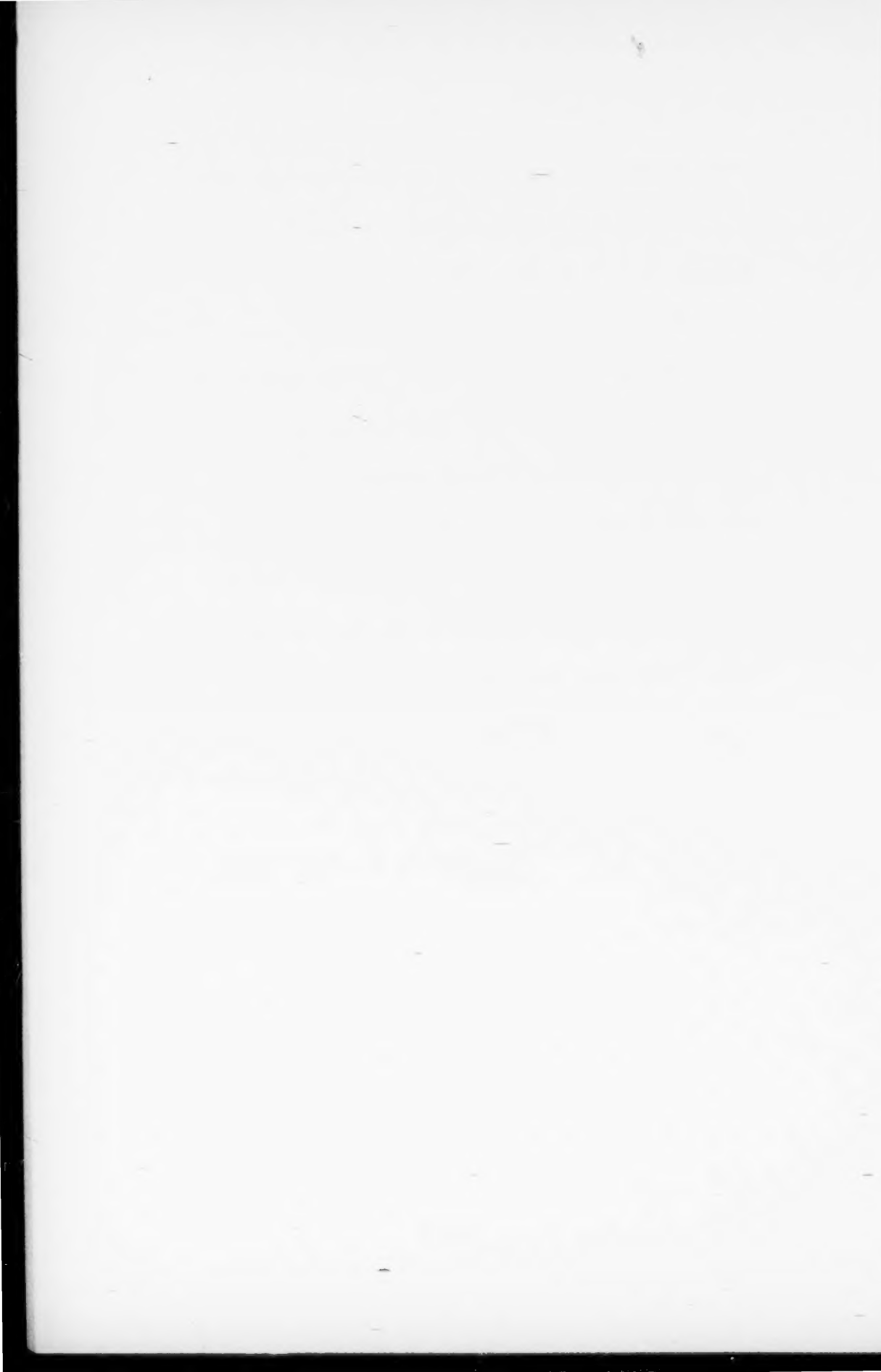
Assoc., 133 W.Va. 694, 57 S.E.2d 725

(1950).

Based on the above, this Court is of the opinion that the plaintiff received a fair trial which was free of any bias or prejudice and hereby DENIES the plaintiff's Motion for a New Trial with respect to paragraphs 6 and 9 of its Motion.

ENTER: February 23, 1990

/s/ Larry V. Starcher
JUDGE



FOOTNOTE

¹It may be that the passage of time will preclude an effective hearing because of fading memories of the jurors. That question, however, is properly one for the state court to determine. If effective hearing cannot be had, then Petitioner should be entitled to a new trial.

CASE NO.

91-289

Supreme Court, U.S.
FILED

AUG 21 1991

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER, 1991 TERM

BURRELL INDUSTRIES, INC.,
(f.k.a. OHIO RIVER SAND
& GRAVEL COMPANY),

Petitioner,

v.

CONTRACTORS SUPPLY CORP.,

Respondent.

ON WRIT OF CERTIORARI TO THE
WEST VIRGINIA SUPREME COURT OF
APPEALS AND THE CIRCUIT COURT
OF OHIO COUNTY, WEST VIRGINIA

RESPONDENT'S BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

(1) Whether a state court violates a party's rights under the due process clause of the Fourteenth Amendment to the United States Constitution by implementing procedures other than a hearing, including curative instructions and individual polling of the jurors, to prevent jury bias and to determine whether any such bias exists, where a juror has disclosed to the court that a potential for bias toward one of the parties may exist, and no objection was placed upon the record.

(2) Whether the absence of appellate review as a matter of right under state law constitutes a violation of rights under the due process clause of the Fourteen Amendment to the United States Constitution.

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STATEMENT OF THE CASE

The subject case arises out of a contract dispute tried before the Circuit Court of Ohio County, West Virginia. This contract case involved the sale of aggregate materials, such as sand and gravel, which are used in the construction business. The petitioner was the seller in this arrangement, and respondent¹ was the buyer. The case was bifurcated, the first portion of the trial being held in July of 1988 on the question of which of two written documents constituted the operative contract. The two documents were designated "Contract A" and "Contract B." At the end of the first portion of the trial, the jury found that "Contract A" was the operative contract.

¹Rule 29.1 Note - Respondent, Contractors Supply Corp., has no parent or subsidiary companies.

The second portion of the trial was held in November of 1988 before the same judge and jury. The jury was then asked to determine whether either party had breached the terms of "Contract A." If the jury found the contract had been breached, it was then to determine what damages had resulted. The jury found that the contract had been breached by the plaintiff, petitioner herein, and awarded the defendant, respondent herein, the amount of \$100,000.00 upon its counterclaim.

On the morning of the second day of the second portion of the trial, one of the jurors approached the trial judge and stated to the judge that she, or some other members of the jury, had "feelings" about one of the parties that could possibly prevent the jury from reaching a fair verdict. The juror also indicated that those feelings had been generated by

evidence heard in the first portion of the trial. The juror also stated that she wondered whether there would be feelings about one of the parties being a big corporation versus the other party which was a small corporation. The trial judge did not immediately inform counsel for the parties about her conversation with the juror. However, the judge did notify counsel of this conversation while the jury was deliberating. The trial judge informed the parties that she had instructed the juror on the necessity of making a determination in the case based solely upon the evidence, and that she had included curative instructions in the charge to the jury. Neither party, by their counsel, made any motions throughout the time that the jury was deliberating. A verdict was then returned in favor of the defendant, respondent herein, for the amount of \$100,000.00, upon its

counterclaim. The trial judge then polled the jury and asked each of them if their verdict was based solely upon the evidence. Each of the jurors individually indicated that his or her verdict was for the defendant, respondent herein, and that his or her verdict was based solely upon the evidence produced at trial. Several days after the conclusion of the trial, on November 23, 1988, the petitioner filed motions for judgment notwithstanding the verdict and for a new trial, which included a request for a hearing to determine the scope, extent and duration of any jury bias.

The trial judge made a request to the Supreme Court of Appeals of the State of West Virginia to recuse her from a consideration of those parts of petitioner's motion for new trial which dealt with the issue of her conversation with the juror. The Supreme Court of West

Virginia granted this request and appointed a trial judge from another circuit to decide the issue. That judge examined the curative instructions given by the trial judge, the polling of the jury, the nature of the juror's statement to the judge as related by the trial judge, and also the fact that no objections were presented prior to verdict regarding the inclusion of the subject juror on the panel or to the deliberation by that panel of the issues presented. Based upon his review of all these considerations, the special judge found that the petitioner herein received a fair trial which was free of bias or prejudice, and therefore, denied the motion for a new trial upon the grounds of alleged jury bias.

Petitioner herein subsequently petitioned the Supreme Court of Appeals of the State of West Virginia to hear an

appeal of its case. However, that court, in its discretion, declined to grant the petition. Petitioner filed its petition for writ of certiorari to the United States Supreme Court on July 1, 1991. That petition presents two issues framed by the petitioner: the first dealing with a due process right under the Fourteenth Amendment to a hearing to determine the scope and extent of jury bias, and the second inquiring whether, under the facts of the present case, the absence of an appeal, as a matter of right under state law, violates the petitioner's due process rights.

An application for stay, filed by the petitioner on July 12, 1991, was denied by the Honorable Justice Rehnquist on July 23, 1991.

ARGUMENT - REASONS FOR DENYING WRIT

(1) THE TRIAL COURT'S DENIAL OF THE PETITIONER'S REQUEST FOR A HEARING ON THE JURY BIAS ISSUE DOES NOT VIOLATE THE DUE PROCESS RIGHTS OF THE PETITIONER SINCE ADEQUATE ALTERNATIVE MEASURES WERE TAKEN BY THE COURT TO INSURE A FAIR TRIAL, AND THE PETITIONER FAILED TO MAKE A TIMELY OBJECTION UPON THE RECORD.

The respondent agrees that all parties to litigated actions have the right to fair trials in fair tribunals, which includes the right to an impartial and unbiased finder of fact. It is respondent's position that in this case the trial court took adequate precautions to insure that the verdict rendered was reached without the influence of any improper bias.

In the proceedings before the trial court, at the conclusion of the closing arguments, and just after the jury had retired to the jury room to begin deliberations, the judge informed counsel and the parties, in open court and on the record, that she was approached on the

morning of the second day of the second portion of the trial, by one of the jurors regarding the juror's concerns about one of the parties and whether a fair verdict could be returned. The judge related the conversation between herself and the juror as follows:

. . . she started out by making a statement to me that she didn't think that there could be a fair trial in the case and I said, "Why?" And she said-I don't know if she said we or they-had feelings about one of the parties that would possibly prevent them from giving a fair verdict. And I said, "Are those feelings feelings that were personal to the jurors before they were selected to serve on the jury originally, or feelings that were generated because of sitting through the prior trial in this case?" And she said it was, I said, "Based on the evidence you heard at the last case?" And she said, "Yes, it was based on the evidence in the previous case." And I said, "all the jurors will be instructed that personal opinions not based on the evidence cannot be considered by them in reaching the verdict at trial." And I decided to emphasize that in the final

charge. [Trial Transcript II, pp. 470-471].

. . . This juror also stated she wondered whether there would be feelings about this being a small corporation versus a big corporation and I told her that they would be instructed in regard to that and that's the reason I threw into the final charge the point that it makes no difference if it's a small corporation versus a big corporation. [Trial Transcript II, p. 471].

When the Court informed counsel and all parties of her conversation with one of the jurors, there was no objection by petitioner. The judge made the disclosure before the jury returned its verdict and petitioner could have moved for a mistrial or made other motions or requests concerning the statement at that time, but it chose to remain silent. As a result of its silence, petitioner waived all subsequent remedial actions with respect to juror bias or prejudice. See syl. pt. 5, McGlone v. Superior Trucking, 363 S.E.2d 736 (W. Va. 1987). Silence, where

there is a duty to speak, may result in waiver of one's right. See generally syl. pt. 3, Steinbrecher v. Jones, 151 W. Va. 462, 153 S.E.2d 295 (1967). A waiver is the voluntary, intentional relinquishment of a known right, and implies an election by a party to give up something of value or to forego some advantage which it might, at its option, have insisted on and demanded. Nationwide Mut. Ins. Co. v. Smith, 153 W. Va. 817, 172 S.E.2d 708 (1970); and see syl. pt. 3, Hoffman v. Wheeling Sav. & Loan Ass'n, 133 W. Va. 694, 57 S.E.2d 725 (1950); Smith v. Bell, 129 W. Va. 749, 41 S.E.2d 695, (1947).

The trial notes of counsel for respondent reflect that the jury retired to the jury room at approximately 2:45 p.m. Immediately thereafter, the judge made her statement concerning the juror. At approximately 3:45 p.m., the jury returned to the courtroom with a question

which resulted in the judge's rereading of the entire charge to the jury. The jury then retired again to the jury room, and at approximately 4:55 p.m., it returned again to the courtroom with another question, this one dealing with the type of verdict it might return. This question was answered and the jury again retired to the jury room, returning to the courtroom at approximately 5:25 p.m. with its verdict. At no time between 2:45 p.m. and 5:25 p.m. did petitioner make any kind of motion or request to the court regarding the judge's statement concerning the juror.

By failing to timely object to the judge's disclosure, petitioner chose to gamble on the outcome of the trial. Since its gamble resulted in a verdict for respondent, petitioner cannot now claim that it was deprived of a fair trial. To constitute a waiver of right, the right

must exist, the party charged with the waiver must know of the right's existence, and there must be a voluntary intention to relinquish it. Hoffman, supra. Petitioner had the right to object, move for a mistrial, or make some other type of motion when the judge made her disclosure, but it voluntarily chose to relinquish that right.

It cannot be seriously argued that the potential prejudice of the jury could not have been remedied prior to the verdict. Upon motion of the petitioner, the juror might have been questioned before counsel to determine the possible existence, extent and communication to other jurors of her potentially prejudiced attitudes. If any bias existed, she might have then been excused from the jury and replaced by one of the alternate jurors who had already heard all the testimony in the case. Thus, any misconduct of the

inquiring juror might have been corrected if petitioner had simply taken action at the time the judge disclosed her conversation with the juror, but petitioner's failure to take timely action constitutes an affirmative waiver of all objections on this account. McGlone v. Superior Trucking Co., supra, at 745.

In a similar setting, it has been held that a defendant cannot gamble on a favorable verdict before urging a communication with the jury as error, but must make a prompt objection and motion for mistrial or he will lose any advantage to be gained by it. State v. Roden, 216 Or. 369, 339 P. 2d 438 (1959). Although the communication with a juror in the current case took place between the judge and the juror, not between a witness or counsel and a juror, the result remains the same.

Petitioner had full knowledge of its right to place a timely objection on the record as soon as the judge disclosed her communication with the juror. By its conduct, it relinquished that right with full knowledge of the effect of its actions. Petitioner abandoned and surrendered its right to move for a mistrial based upon its failure to object and cannot now raise that it was denied a fair trial or that it was denied an opportunity to address its concern. Its actions clearly represent a waiver of all subsequent remedial actions.

The jury's verdict in the second portion of the trial was consistent with its verdict in the first portion and was supported by the evidence. Even a poll of the jury after the verdict was rendered showed unanimity of assent, and each juror stated that the verdict was based strictly on the evidence. Examining the jury by

the poll is the most generally recognized means of ascertaining whether they are unanimous in their decision. 76 Am. Jur. 2d Trial §1122 (1975).

It should also be noted that this case is distinguishable from West Virginia Human Rights Commission v. Tenpin Lounge, Inc., 158 W.Va. 349, 211 S.E.2d 349 (1975), which was cited by petitioner in support of its contention that a hearing on jury bias issues must be held whenever an allegation of bias arises. In that case, the court not only refused to grant a full interrogation of the jurors by the offended party's counsel, but also refused any further consideration of the alleged bias. Id. at 354. In short, that trial court had refused to take any action regarding the alleged bias of a juror. This is a very different situation from that presented in the instant case, where the trial court, in effect, allowed the

questioning of the jurors, but merely presented the inquiries herself, rather than having counsel for the parties present the questions.

The jurors' responses when polled clearly showed that the judge, and counsel, took sufficient steps to insure that the jury was not influenced by bias or prejudice and that the verdict was based solely upon the evidence. Numerous other precautions were taken by the judge to insure a fair trial. In the initial charge to the jury, the judge stated:

You must find your verdict unaided, unassisted, and uninfluenced by any personal information which you might have, and you must not permit yourselves to be guided, influenced, or swayed by sympathy or by your personal feeling regarding any of the parties.

In the final charge to the jury, the judge stated:

You are further charged that any personal opinion which you may have as to the facts not established by the evidence presented in this case,

cannot be considered by you as the basis of the verdict.

Moreover, the trial judge amended Defendant's Instruction No. 7 and added the following:

I must also instruct you that your verdict should not be based on any personal feelings such as whether you like or dislike any witness or party, or as to whether you are considering a small corporation versus a large corporation.

The judge also stated on the second page of her comments made at the conclusion of closing argument that "personal opinions not based on the evidence cannot be considered by them in reaching the verdict at trial." [Trial Transcript II, pp. 470-471]. She also stated, "And I tried to impart that in the final charge." [Trial Transcript II, p. 471].

Thus, the judge obviously felt that she had taken sufficient steps to insure a fair trial. Usually, determinations of whether a jury is biased or prejudiced are

left to the discretion of the trial judge. West Virginia Dept. of Highways v. Fisher, 289 S.E.2d 213, 218 (W. Va. 1982), cert. denied, 459 U.S. 944 (1982). Matters of qualifications of jurors are left to the discretion of the trial court and will not be disturbed, absent abuse of discretion. State v. Crouch, 358 S.E.2d 782, 785 (W. Va. 1987). It is respondent's position that the judge certainly did not abuse her discretion.

The verdict of a jury will not be set aside on appeal as contrary to the evidence if, when the evidence is viewed as a whole, there appears to be a rational basis for the verdict. Salerno v. Manchin, 158 W. Va. 220, 213 S.E.2d 805 (1974). When the jury has been fully, fairly and accurately instructed on the law of the case, and has rendered a verdict, the court will presume that they gave proper consideration to the

instructions, unless the verdict is plainly contrary to the law and the evidence. See generally Abdulla v. Pittsburgh & Weirton Bus Co., 213 S.E.2d 810 (W. Va. 1975); and Curfman v. Monongahela West Penn Public Service Co., 113 W. Va. 85, 116 S.E. 848 (1932). In the present case, the jury was fully, fairly and accurately instructed and its verdict was based solely on the evidence. Therefore, the jury's verdict herein should not be set aside, but should be upheld as a proper resolution by the finder of fact.

However, petitioner's allegation that the juror who approached the judge had a preexisting bias against it was disproven since the jurors were polled after rendering their verdict. Jurors are presumed to be impartial, absent indications to the contrary. Wells v. Murray, 831 F.2d 468, 472 (4th Cir. 1987).

Furthermore, it is within the trial judge's discretion to determine the credibility of a juror's statements of bias and prejudice. United States v. Thompson, 744 F.2d 1065 (4th Cir. 1984). Even where juror misconduct is demonstrated, which here it was not, prejudice to a party will not be presumed, but must be proved. Haight v. Goin, 346 S.E.2d 353, 355 (W. Va. 1986).

When the judge inserted the language regarding personal feelings between a small corporation and a large corporation, she cured any possible chance of unfairness to the parties in that case. Her actions were similar to a curative instruction which is usually given when inadmissible evidence is mistakenly disclosed to the jury. In such a case, evidence is cured by its being subsequently withdrawn or stricken before the close of the trial and by an

instruction given to the jury to disregard it, especially where there is other evidence upon which the verdict can be based and where there is no motion for a mistrial. Chambers v. Smith, 157 W. Va. 77, ___, 198 S.E.2d 806, 810 (1973).

The failure of the judge to immediately disclose her communication with the juror was, at most, harmless error. See W. Va. R. Civ. P. 61, Harmless Error. The West Virginia Supreme Court of Appeals will disregard and regard as harmless any error, defect or irregularity in proceedings in the trial court which do not affect the substantial rights of parties. Geary Land Co. v. Conley, 338 S.E.2d 410 (W. Va. 1985); and Syl pt. 4, McAllister v. Weirton Hospital Co., 312 S.E.2d 738 (W. Va. 1983). Appellant's rights were not affected in any way because (1) the judge took several steps to insure a fair trial, (2) the verdict

was consistent with the verdict in the first portion of the trial, and (3) the verdict was based solely on the evidence.

In light of the instructions given by the trial court to the jury, and the court's polling of each individual juror to determine the accuracy of their verdict and basis for their verdict, the trial court took adequate steps to insure a fair trial and to vouchsafe that a fair verdict was, in fact, rendered. Under these circumstances, a post-trial hearing regarding the presence of potential juror bias would have been redundant, and unnecessary. The steps taken by the trial court, in this action, were adequate to safeguard the petitioner's right to a fair trial before an impartial fact finder.

(2) THE PETITIONER'S LACK OF AN AUTOMATIC RIGHT OF APPEAL IN WEST VIRGINIA DOES NOT VIOLATE THE PETITIONER'S RIGHT TO DUE PROCESS UNDER THE UNITED STATES CONSTITUTION.

As correctly noted by the petitioner, the United States Supreme Court has previously, and repeatedly, stated that the constitution establishes no right to an appeal. See United States v. MacCollom, 426 U.S. 317 (1976); Griffin v. Illinois, 351 U.S. 12 (1956); McKane v. Durston, 153 U.S. 684 (1894). In fact, the United States Supreme Court has indicated that appellate review is not even an element of due process of law, and, consequently, there can be no constitutional right to an appeal. As stated in McKane v. Durston, supra at 687:

An appeal from a judgment of conviction is not a matter of absolute right, independently of constitutional or statutory provisions allowing such appeal. A review by an appellate court of the final judgment in a criminal case however grave the offense of which the accused is convicted, was not at common law

and is not now a necessary element of due process of law. It is wholly within the discretion of the state to allow or not to allow such a review. A citation of authorities upon the point is unnecessary.

Cited at Billotti v. Dodrill, 394 S.E.2d 32, 36 (W. Va. 1990).

The substance of petitioner's argument is that it was denied a fair trial because of the presence of alleged juror bias, and consequently that a failure to grant it an appeal will leave it with no avenue for redress of this wrong. Petitioner does not dispute that appeals in civil actions such as the instant case are granted by the West Virginia Supreme Court within their discretionary powers. However, even an exercise of discretion must comport with dictates of the due process clause of the constitution. See Evitts v. Lucey, 469 U.S. 387, 401 (1985). The question of whether West Virginia's appellate practice, and particularly its discretion

regarding the selection of cases for hearing on appeal, was considered in the case of Billotti v. Dodrill, supra. Notably, that case dealt with a defendant seeking an appeal from a murder conviction, with respect to which he had been sentenced to life without mercy, the most severe sentence possible under West Virginia law. The West Virginia Supreme Court had this to say:

An examination of our own practice of reviewing petitions for appeal reveals that, although there are 'significant discretionary elements,' the procedure comports with the due process requirements of both the federal and state constitutions.

* * *

In State v. Legg, 151 W. Va. 401, 151 S.E.2d 215, 218 (1967), this court recognized that '[o]ne convicted of a criminal offense is not entitled to a writ of error as a matter of right. The Constitution and statutes create an absolute right merely to apply for a writ of error' (emphasis added). A denial of the right, however, 'constitutes a violation of both federal and state due process

clauses and renders the conviction void.' Carrico v. Griffith, 165 W. Va. 812, 272 S.E.2d 235, 239 (1980).

Billotti v. Dodrill, supra at 37, 38.

The petitioner herein was not denied its right to apply for a writ of error or appeal. Indeed, petitioner submitted its petition for appeal to the West Virginia Supreme Court, which petition was considered and denied on April 2, 1991.

The essential elements for an opportunity to be heard in appellate procedure are as follows:

In some jurisdictions, appellate review is provided through a procedure in which the applicant seeking leave to appeal presents a petition that is considered by a panel of the appellate court; the case is heard by the court as a whole only if the panel grants the petition. So long as the procedure for application involves the essential elements of the opportunity to be heard, this type of procedure in substance resembles that in which a matter on appeal is first heard by a division of a court and then considered en banc. The essential elements of the opportunity to be heard in

appellate litigation are the rights to: (1) present the record of the proceedings below, (2) submit written argument in the form of briefs, (3) present oral argument except in cases where it has so little utility that it may justly be denied, and (4) thoughtful consideration of the merits of the case by at least three judges of the court. Procedures for appellate review that lacked these elements do not provide a true appeal of right.

ABA Appellate Standard 3.10, American Bar Association Commission on Standards of Judicial Administration: Standards Relating to Appellate Courts (1977); cited at Billotti v. Dodrill, supra at 38.

The Rules of Appellate Procedure West Virginia Supreme Court of Appeals (hereinafter W. Va. R. A. P.) provide for all of the elements cited above. The record of the proceedings below may be presented to the court pursuant to W. Va. R. A. P. 4(c) which states:

Record on Petition. The appellant shall designate by itemization to the Clerk of the Circuit Court such pleadings, orders and exhibits to enable the Supreme Court to decide the matters arising in the petition
. . . .

A companion provision for presentation of a petition without transcript of testimony is given at W. Va. R. A. P. 4A(c). Written arguments in the form of briefs regarding the petition for appeal are permitted under W. Va. R. A. P. 10(a) and (b). Such briefs were filed in this action and considered by the West Virginia Supreme Court prior to its April 2, 1991 order. Oral argument on the petition is permitted under W. Va. R. A. P. 5, and did in fact take place in this case. Consideration of the case, and whether it should be granted the discretionary full hearing on appeal, is given by all five members of the West Virginia Supreme Court. In the instant case, the request for review was denied by a vote of four to one.

Under the facts presented, the West Virginia Supreme Court's denial of petitioner's petition for appeal did not

violate petitioner's due process rights,
and petitioner, therefore, has no further
right to appeal either before the West
Virginia Supreme Court or before the
United States Supreme Court.

CONCLUSION

For all the above-stated reasons, the
respondent prays that this Court deny the
Petitioner's Petition for Writ of
Certiorari.

Respectfully submitted,

CONTRACTORS SUPPLY CORP.,
Respondent

By /s/ James F. Companion
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